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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

STEVEN ARTHUR LATULIPPE, M.D.,

Plaintiff,

v.

KATHLEEN HARDER, in her official capacity as Chair of the Oregon Medical Board; SAURABH GUPTA, in her official capacity as Vice Chair of the Oregon Medical Board; ERIN CRAMER, in her official capacity as Secretary/Physician Assistant Member of the Oregon Medical Board; ROBERT M. CAHN, in his official capacity as a member of the Oregon Medical Board; JAMES K. LACE, in his official capacity as a member of the Oregon Medical Board; CHARLOTTE LIN, in her official capacity as a member of the Oregon Medical Board; PATTI LOUIE, in her official capacity as a member of the Oregon Medical Board; JENNIFER L. LYONS, in her official capacity as a member of the Oregon Medical Board;

Case No. 3:21-cv-00090-HZ

**DECLARATON OF MARC ABRAMS IN
SUPPORT OF PARTIAL MOTION TO
DISMISS**

ALI MAGEEHON, in her official capacity as a member of the Oregon Medical Board;
CHERE PEREIRA, in her official capacity as a member of the Oregon Medical Board;
CHRISTOFFER POULSEN, in his official capacity as a member of the Oregon Medical Board;
ANDREW SCHINK, in his official capacity as a member of the Oregon Medical Board;
JILL SHAW, in her official capacity as a member of the Oregon Medical Board,

Defendants.

1. I am Assistant Attorney-in-Charge of the Civil Litigation Section of the Oregon Department of Justice (“DOJ”), and I am one of the attorneys representing Kathleen Harder, Saurabh Gupta, Erin Cramer, Robert M. Cahn, James K. Lace, Charlotte Lin, Patti Louie, Jennifer L. Lyons, Ali Mageehon, Chere Pereira, Chrisoffer Poulsen, Andrew Schink and Jill Shaw in this action.

2. Attached to this declaration as Exhibit A is the transcript of the oral argument on plaintiff’s motion for a temporary restraining order dated February 4, 2021.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED March 18, 2021.

s/Marc Abrams
MARC ABRAMS
Assistant Attorney-in-Charge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

STEVEN ARTHUR LATULIPPE,)
)
Plaintiff,) No. 3:21-cv-00090-HZ
)
vs.) February 4, 2021
)
KATHLEEN HARDER, et al,) Portland, Oregon
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

BEFORE THE HONORABLE MARCO A. HERNANDEZ
UNITED STATES DISTRICT COURT CHIEF JUDGE

Court Reporter: Ryan White, RMR, CRR, CSR/CCR
United States District Courthouse
1000 SW 3rd Avenue, Room 301
Portland, Oregon 97204
(503) 326-8184

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1 (February 4, 2021; 1:41 p.m.)

2
3 P R O C E E D I N G S
4

5 THE COURT: Good afternoon.

6 MR. ABRAMS: Good afternoon, Your Honor.

7 THE COURT: We are here in the matter of LaTulippe
8 versus Harder. It is case number 21-cv-00090-HZ. This matter
9 comes to the court by way of a hearing on a motion for a
10 temporary restraining order.

11 Before we begin, I want to take roll and find out who
12 is on the call this afternoon. So let me first begin by asking
13 whether I have a court reporter that can hear me.

14 Ryan, are you on?

15 THE COURT REPROTER: (Indicating.)

16 THE COURT: Okay. Good.

17 And then secondly, who's here for the plaintiff?

18 MS. GONDEIRO: Mariah Gondiero, Your Honor.

19 THE COURT: Thank you.

20 And for the defense?

21 MR. ABRAMS: Mark Abrams, Oregon Department of
22 Justice, Your Honor. On the phone, Christina Beatty-Walters and
23 Jessica Spooner.

24 THE COURT: And who is going to be arguing for the
25 state?

1 MR. ABRAMS: I will, Your Honor.

2 THE COURT: All right. So let's begin our
3 conversation starting with the plaintiff. The plaintiff has the
4 burden of proof and has to do the convincing this afternoon, so
5 we'll start -- we'll start there.

6 What does the plaintiff want to tell me?

7 And I guess I should say that I've read everything
8 that you've submitted. Just be aware of that.

9 MS. GONDEIRO: Thank you, Your Honor.

10 THE COURT: And let's start with the plaintiff.

11 What do you want to tell me?

12 MS. GONDEIRO: Thank you, Your Honor.

13 This Court should immediately reinstate
14 Dr. LaTulippe's license because the defendants violated his
15 procedural due process rights and he is suffering irreparable
16 harm that is concrete and increasing daily.

17 In regards to the merits, Dr. LaTulippe has alleged a
18 due process violation. The Court looks at three issues: The
19 liberty of property interest protected by the constitution, a
20 deprivation of the interest by the government, and a lack of due
21 process.

22 The two issues really aren't in dispute right now:
23 The plaintiff self-evidently has an interest in his medical
24 license and it is a constitutionally-protected interest that the
25 Supreme Court has acknowledged. And it's also not disputed that

1 the defendants have deprived Dr. LaTulippe of his property
2 interest by taking away his license.

3 The main issue that is before this Court is whether
4 Dr. LaTulippe has alleged a lack of due process.

5 The Supreme Court in *Cleveland Board of Education* has
6 described the root requirement of due process as requiring that
7 an individual be given an opportunity for a hearing before he is
8 deprived of any significant property. Indeed, Oregon law
9 requires the board provide a contested hearing before revoking
10 or suspending a license.

11 THE COURT REPORTER: I'm sorry. Ms. --

12 MS. GONDEIRO: -- in the case of an emergency --

13 THE COURT REPORTER: Sorry.

14 Yes, Ms. Gondeiro. It sounds like you might be
15 reading. But if you could please slow down, especially with our
16 audio. You need to slow down, please.

17 MS. GONDEIRO: Yes.

18 It is only in a case of an emergency where a doctor
19 poses an imminent danger to the public that the board may
20 suspend a license without first providing a hearing. The
21 defendants have woefully failed to demonstrate that
22 Dr. LaTulippe poses an imminent danger to the public.

23 This is not a case where the board has specific
24 evidence that Dr. LaTulippe has harmed a patient such as by
25 performing an illegal abortion. Here, the board's basis is

1 based upon vague allegations of anonymous accusers and
2 speculative hypotheticals that have no real basis in fact.

3 THE COURT: Let me interrupt you about that point for
4 just a minute.

5 Is there a disagreement that the plaintiff,
6 Dr. LaTulippe, in this case, is not abiding by the health
7 authority's mandate and the governor's mandate that he wear a
8 mask while he's treating his patients and the people in this
9 clinic wear a mask while he's treating his patients? Is that in
10 dispute?

11 MS. GONDEIRO: Well, Your Honor, they really haven't
12 met their burden of showing that he is -- that the people in his
13 clinic are not wearing a mask or have reasons why they're not
14 wearing a mask. Many of them, as you will see in the
15 declaration, have claimed that they do not wear a mask because
16 it causes them discomfort.

17 THE COURT: I'm not talking about that. I'm talking
18 about the providers, him and his -- and the people that work for
19 him. Is that in dispute?

20 MS. GONDEIRO: That he follows the Oregon
21 health -- public health order?

22 THE COURT: No. I said does he wear a mask?

23 MS. GONDEIRO: He does not wear a mask at all times.

24 THE COURT: All right. And then in addition to him,
25 the other people that work with him also do not wear a mask; is

1 that correct?

2 MS. GONDEIRO: Yes, Your Honor. But as they say in
3 the -- their declarations, many of them have reasons why they do
4 not wear a mask.

5 THE COURT: The people that work there?

6 MS. GONDEIRO: They do work there, Your Honor. There
7 are two people: There is the receptionist and then
8 Dr. LaTulippe's wife.

9 THE COURT: And none of those people are wearing
10 masks; is that correct?

11 MS. GONDEIRO: No, Your Honor. Or, yes, Your Honor.

12 THE COURT: All right. And in -- and the reason
13 Dr. LaTulippe and perhaps the people that work with him are not
14 wearing a mask is that he disagrees with the -- with I'm going
15 to say -- use the word "science," but he disagrees with the
16 science right now that says that it is better, safer, and
17 mandated by law that individuals that are providing healthcare
18 wear masks. He disagrees with that perspective; is that
19 correct?

20 MS. GONDEIRO: Your Honor, I think that he, and as
21 well as reputable studies and reputable experts, would disagree
22 with many of the scientific opinions of the board.

23 But I do not think that is the reason and it's not
24 alleged in the complaint that the two employees that work there
25 do not wear masks. As they claim in their declaration, they

1 have anxiety and asthma. If they wear a mask, they have, you
2 know, terrible side effects.

3 But I think what's important to note is that the board
4 hasn't even alleged an actual threat or real evidence of harm.
5 And as we allege in the complaint, they make sure that all
6 COVID-19 patients are not around other people. There have been
7 no COVID-19 transmissions traced to the office.

8 And also, Your Honor, as I get back to, you know,
9 their justification, which is based on the emergency exception,
10 not only are the allegations not true, Your Honor, as we contest
11 in the complaint, he has never told anyone that they should not
12 wear a mask in the office. Many of the allegations are simply
13 not true and, most importantly, they have yet to prove any real
14 evidence.

15 The need for a predetermination hearing is required
16 when a defendant cannot satisfy the three-prong test laid out in
17 *Mathews v. Eldridge*. This test includes the private interest
18 affected, the risk of an erroneous deprivation through the
19 procedures used, and the value of other safeguards and the
20 government's interests.

21 An individual's private interest in his business, in
22 his livelihood, is significant. The Supreme Court has
23 consistently recognized the severity of depriving someone of
24 their means of livelihood, and that is exactly what the board
25 has done. They have deprived him of his livelihood and his

1 ability to make a living.

2 Regarding the second prong, which I think is the most
3 important issue that we're discussing, the risk of an erroneous
4 deprivation must be considered under the procedures used by
5 defendants along with the probable value, if any, of additional
6 or substitute procedural safeguards.

7 Here, a pre-deprivation hearing would have eliminated
8 the risk of erroneous deprivation. As the Supreme Court has
9 recognized in *Cleveland Board of Education*, dismissals, or in
10 this case a suspension, will often involve factual disputes.
11 That is definitely the case here.

12 Many of the board's allegations are factually
13 erroneous. Dr. LaTulippe has never told a patient he could not
14 treat them if they wore a mask. Indeed, if the board would have
15 actually conducted an early hearing and done their due
16 diligence, they would have learned that their concerns were
17 completely unfounded. Dr. LaTulippe has not contributed to any
18 known COVID-19 case. His COVID-19 protocol is highly
19 successful.

20 Further, the order of suspension is defective and
21 failed to provide Dr. LaTulippe proper notice. For one, the
22 board doesn't articulate in the appropriate place which laws
23 Dr. LaTulippe has actually violated. The conclusions of law
24 section does not, in fact, refer to any law that has been
25 violated. The only reference to a violation of law is found in

1 the findings of fact.

2 And more importantly, Your Honor, the board does not
3 specify a single act or omission that constitutes a serious
4 danger to the public's health or safety. Notice, to comply with
5 due process requirements, must set forth the alleged misconduct
6 with particularity.

7 If you look over the findings of fact, none of the
8 allegations are specific. The board relies on an anonymous
9 accuser, but they do not even describe the context of the
10 accuser in Dr. LaTulippe's conversation.

11 The board also references a YouTube video that
12 provides false information about masks. The board didn't even
13 provide a link to this supposed YouTube video. My client could
14 have posted multiple YouTube videos. How is he supposed to know
15 what YouTube video they're talking about or what to challenge?

16 And notably, Your Honor, on page 5 of the order, they
17 state that Dr. LaTulippe's conduct might constitute a danger to
18 the health or safety of the public.

19 Summarized, their justification rests entirely on the
20 prospective notion that Dr. LaTulippe might contribute to the
21 spread of COVID-19. These conclusory findings do not satisfy
22 the specific and particular requirements the Supreme Court
23 requires.

24 Regarding the final prong, Your Honor, the government
25 interest in immediate termination does not outweigh the first

1 two prongs. Affording Dr. LaTulippe an early hearing would not
2 have imposed significant administrative burdens or intolerable
3 delays. A prompt hearing would have actually minimized
4 financial and administrative burdens because the board would
5 have quickly learned their allegations were meritless.

6 Finally, Your Honor, the balance of equities tips
7 sharply in favor of Dr. LaTulippe and an injunction serves the
8 public interest. The harm to the government and public interest
9 merge when the government is the opposing party.

10 With respect to a balancing of equities, the
11 speculative harm of the possibility of COVID-19 transmission
12 does not outweigh the instant and definite harm of denying
13 Dr. LaTulippe his constitutionally-protected right to due
14 process, nor his right to make a living in his chosen profession
15 and his patients' need for competent and accessible medical
16 care.

17 The board has failed to identify a single
18 COVID-19-positive case that can be verifiably traced back to the
19 plaintiff's practice. Speculative injury does not constitute
20 irreparable injury.

21 Moreover, the board supposedly received an anonymous
22 tip back in the summer. They waited five months to issue an
23 emergency suspension which belies their claim that emergency
24 exists.

25 On the other hand, Dr. LaTulippe and his clients are

1 suffering real, concrete injuries that are increasing every day.
2 Dr. LaTulippe has lost everything he has worked towards. He has
3 lost his ability to make a living and provide for his family in
4 the middle of a pandemic where people are suffering.

5 Further, Your Honor, his clients desperately need his
6 help. He gets calls every single day from his patients who are
7 scared because they don't have another pain specialist to go to
8 in Dallas, Oregon. This isn't a huge city where there's a lot
9 of pain and addiction specialists. He has helped people who
10 were on the brink of suicide because they were in so much pain
11 and they call him crying because they need his help.

12 And also, Your Honor, many of his clients are
13 relapsing and just struggling. Thus, it is not Dr. LaTulippe
14 that is posing an immediate threat, Your Honor; it is the
15 board's decision to suspend his license.

16 Thank you.

17 THE COURT: Thank you.

18 I'll hear from the state.

19 MR. ABRAMS: Thank you, Your Honor.

20 To start with, a couple of facts, not necessarily
21 responding to Counsel's oral argument, but to some of the
22 response -- reply memo.

23 They have contended that there is only one anonymous
24 complaint against Dr. LaTulippe. In fact, there are seven, and
25 the citation to that is paragraph 3 of the Carruth declaration.

1 There is no challenge, as you noted, that
2 Dr. LaTulippe and his staff are not wearing masks. There is no
3 challenge that most of his patients, anyone who is asymptomatic,
4 have not been made to wear masks. There is no challenge to the
5 idea that he refused to change that practice, and he said so in
6 an August 31, 2020, letter. That is Carruth Declaration
7 Exhibit 2.

8 Now, as has been made clear, the Oregon OSHA, the
9 Oregon Health Authority, and the Oregon Medical Board have all
10 instituted regulations, and the governor has instituted
11 emergency orders that require masks not merely in the
12 professional setting, such as Dr. LaTulippe's office, but
13 whenever any of us go out in public or are in places where
14 people congregate, as, indeed, Your Honor is currently wearing a
15 mask himself.

16 But the issue here is much simpler than that. The
17 issue is, is Dr. LaTulippe allowed, entitled to pre-deprivation
18 due process.

19 It is not contested that there's a hearing set, as we
20 mentioned in the status conference a few days back, for
21 February 16th. Indeed, Dr. LaTulippe knew this process was
22 underway in August. He was suspended in early December. He did
23 not reach out to the OMB for a month. If this is irreparable
24 harm, it is curious that he waited a full month before having a
25 discussion with the OMB. And the citation to that is

1 paragraph 2 of the Foote declaration.

2 He was offered a hearing that would have started
3 three days ago, Your Honor. He was offered a hearing that would
4 have started February 1st. He turned it down. So again, more
5 delay, not the OMB's doing, but Dr. LaTulippe's. The citation
6 for that: Foote declaration, paragraph 3.

7 Now, plaintiff wants to argue the science, and she
8 said -- Counsel has said multiple times, four or five times, in
9 her presentation that OMB has not met its burden. We have no
10 burden. This is their TRO. The burden is -- all aspects is on
11 them.

12 Nonetheless, we would stand by the science. We have
13 submitted to you the Farris declaration, the Sidelinger
14 declaration. They talk about the help that wearing masks does
15 in combating this disease. They talk about how they do prevent
16 many of the droplets and reduce the risk of threat. That's good
17 enough science to make this the law of the state of Oregon and,
18 in fact, it is the law of the state of Oregon.

19 Now, plaintiff seems to think that he's immune from
20 that, that he cannot obey if he thinks he knows the science
21 better, and I would suggest to you that if I think the bar
22 rulings on not allowing me to talk to a represented party are
23 foolish, I do not get to talk to an unrepresented party and get
24 away with it. If I'm a physicist who thinks that a yellow light
25 needs to be six seconds long in order to be safe to allow me to

1 slow down my car, I do not get to run a four-second red light
2 and take that extra two seconds because I believe the science
3 for setting that red light is wrong.

4 Plaintiff has suggested not only that the masks don't
5 protect from COVID, but do trap carbon dioxide to a person's
6 detriment. This is bad science. COVID is 120 -- the virus
7 itself is 125 nanometers in size, an eighth of a micron, as the
8 doctor said. CO₂, a carbon dioxide molecule, is 33 nanometers,
9 only one quarter the size. So if there's anybody with suspect
10 science, the doctor's science makes no sense.

11 And while he has said he studied microbiology, the
12 virus is not transmitted free floating, but it's with much
13 larger respiratory droplets, and you can see that in paragraph 6
14 of the Farris declaration, paragraph 4 of the Sidelinger
15 declaration, and Exhibit 1 of the Brown declaration at
16 paragraph 3.2.

17 So moving on to the question of due process, we agree
18 on the three-part test; what is the private interest, what is
19 the erroneous deprivation through the procedures used, what is
20 the government's interest.

21 The government's interest, I think, is clear. It's
22 keeping the citizens of Oregon safe. The private
23 interest -- and if plaintiff has -- and if somebody is on the
24 phone, they -- it would be nice if they could mute it. I'm
25 hearing background voices.

1 The private interest has been variously presented as
2 either the plaintiff's patients or the plaintiff's income.
3 Well, under *Winter* and under the other cases we've cited in our
4 brief, you do not get to assert another person's harm in support
5 of a temporary restraining order and in support of your
6 pre-deprivation process, and his financial interest is not
7 related to irreparable injury except in certain circumstances.

8 But the cases cited by plaintiff himself, *Laudermill*
9 and *Tanasse v. City of St. George*, and also the case we cited,
10 *Gilbert v. Homar*, all make clear that pre-deprivation hearings
11 are very rare, and, for example, even if not allowed -- if
12 you're on subsistence, if you're on welfare -- the individual in
13 *Laudermill*, cited frequently by plaintiffs, was a person
14 receiving welfare benefits. They were deprived in a way that is
15 probably far more serious than a doctor like Dr. LaTulippe who
16 presumably is financially much more comfortably off. They were
17 not entitled to a pre-deprivation hearing.

18 The idea that there would be a less erroneous
19 deprivation through the procedures used, the procedures used
20 prehearing, pre-deprivation, and post-deprivation are the same.
21 They come out of chapter 183 of the Oregon Administrative
22 Procedures Act. There would not be anything different.

23 What plaintiff is assuming, what plaintiff is
24 presuming is that if we had heard him, we would have been
25 convinced.

1 Now, I do not want to speak for my client and what
2 they will do. I am not on the Oregon Medical Board and the
3 hearing has not taken place yet. But I warrant that when they
4 suspended Dr. LaTulippe because he said "I am not going to put
5 on a mask, I am not going to make my staff put on a mask," and
6 we can conclude based on today's representations that he would
7 still say that, that I warrant there would not be much
8 difference in pre- and post-hearing risk of erroneous
9 deprivation.

10 Now, that brings us to the elements of the temporary
11 restraining order. The likelihood of success element -- and we
12 are in agreement it's the four elements from *Winter*. Burden of
13 success at all times rests with the plaintiff under *Clinton v.*
14 *Jones*, 530 US 681 at 708.

15 The plaintiff has presumed there is no evidence of
16 actual harm. That is not the standard for suspension.

17 The standard -- and it's in the document, the
18 suspension document -- is imminent threat of danger. That
19 standard does not require the OMB to conclude or prove the harm
20 has already occurred.

21 So it's not our duty to show that masks are harmful.
22 Indeed, at most, all we have to do is show what is uncontested;
23 that there was a regulation, that it was applied broadly to
24 everyone, and that Dr. LaTulippe refused to comply. None of
25 those are disputed.

1 So under *Gilbert*, under *Tanasse*, the law is fairly
2 clear that there is no right to a pre-deprivation hearing. A
3 post-deprivation hearing has already been set and is on the
4 books.

5 As to irreparable harm, I touched on it a little
6 earlier. Financial harm is not relevant in -- except in very
7 unusual circumstances. That's both *Winter* and *MR v. Dreyfus*,
8 697 F.3d 706 at 725.

9 There is almost never a situation in which loss of
10 money constitutes an irreparable injury, and so we just don't
11 think that that is -- that is going to be the standard for
12 irreparable harm. And, indeed, had Dr. LaTulippe called the OMB
13 worried about the suspension, had he accepted an earlier
14 hearing, it all would have been done probably in early December.
15 It seems strange to claim that his license (audio broke)
16 resurrected now because of delays entirely of his own doing.

17 Now, as to the balance of equities, clearly the
18 parties disagree. And while plaintiff will not agree to the
19 steps to protect public health and safety, you have the Farris
20 and particularly the Sidelinger declaration.

21 Now, Dr. Sidelinger is the state's epidemiologist.
22 He's been in charge for last year of keeping Oregonians safe and
23 he's telling you what the good science is and why we have asked
24 every doctor, every person, everyone going to a grocery store to
25 obey these rules, this wearing of a mask. This has been part of

1 a multifaceted approach that has kept the death rate in Oregon
2 at a fraction of that of other states. We have the fifth lowest
3 death rate in the country, and all four other states -- Maine,
4 Vermont, North Dakota, and I believe it's -- the fourth is
5 either Montana or Hawaii -- are way less than half our size. We
6 are the largest state with the smallest death rate. We're doing
7 something right.

8 Now, plaintiff claims we can't prove that there have
9 been more cases of COVID-19 as a result of his practice. That
10 assertion is not backed up by any evidence he has put into the
11 record here. And I think plaintiffs have persistently in this
12 hearing and in their paperwork confused making an allegation
13 with establishing a fact. This is not a motion to dismiss
14 hearing, of course; it is a TRO hearing.

15 And he has not claimed -- he has not put anything in
16 the record in front of you that there's been any contact tracing
17 related to his practice. So whether or not there's been a case,
18 he cannot know.

19 We know that COVID-19 can be asymptomatic for two
20 weeks. How would we know if he's had a case come out of his
21 situation, his practice? We can't afford to take that risk, and
22 that is why we apply this equally to everyone in Oregon and why
23 that is part of the balance of equities and tips in favor of the
24 state.

25 Now, to just address briefly the issue that

1 it's -- his patients need him. I believe there's a document in
2 the record that shows most of them have been covered by other
3 physicians at this time, but they have persistently and quite
4 simply falsely claimed there's nothing else that can fit their
5 practice convenient for their patients.

6 Now, as we said in our documents, Salem has
7 four -- not one, not two, but four pain specialty clinics only
8 15 miles away and the plaintiff does not explain why 15 miles is
9 too inconvenient for someone needing medical help.

10 Just to give you a comparison, Your Honor, about daily
11 life in Dallas, Oregon, their school, their high school is in
12 the division 5A, section 3 conference. It plays against teams
13 in Corvallis, Lebanon, South Albany. Corvallis is 29 miles
14 away, South Albany is 31 miles away, Lebanon is 47 miles away.
15 Mere entertainment takes the citizens of Dallas quite a bit
16 farther afield. So I would suggest that 15 miles is not too far
17 to go. Dallas is functionally an excerpt of Salem anyway.

18 So finally, the question of public interest.

19 The status quo matters here, Your Honor. COVID-19
20 spreads widely through persons who presume themselves to be
21 healthy. The Harley rally in Sturgis, South Dakota, this last
22 summer created a vector that spiked much in the state of
23 Minnesota. Large mask-less gatherings, whether educational,
24 religious, or otherwise, have caused major outbreaks.

25 Plaintiff would have the Court toss aside the judgment

1 of the CDC and medical professionals not only around the nation
2 but, for the most part, around the world and say that he knows
3 better than the groups that regulate and he knows better than
4 the overwhelming consensus of medical opinion. The Court should
5 decline that offer.

6 Thank you.

7 THE COURT: Thank you.

8 And then a reply on the part of the plaintiff?
9 Rebuttal?

10 MS. GONDEIRO: Yes, Your Honor. There are several
11 things I want to clarify.

12 First, the defendants claim that there are seven
13 anonymous accusers, but none of those accusers are actually
14 mentioned in the notice, which, again, just goes to show that
15 they -- or they are not mentioned in the order which again goes
16 to show why they did not provide sufficient notice. They don't
17 even -- they don't even put out all the evidence they're relying
18 on, which is a violation of due process.

19 The defendants also note that they provided notice to
20 Dr. LaTulippe in August. That is completely false. They never
21 notified him that they were going to suspend his license. They
22 let him know that an investigation was open. And it seems very
23 odd to me that they would wait five months to file an emergency
24 suspension if they had this information back in August.

25 And I also want to talk about the delay, Your Honor.

1 It's actually the defendant's requirement under state
2 law that they provide a hearing simultaneously when they -- when
3 they suspend someone's license. This was actually not
4 Dr. LaTulippe's burden. But it is very important to know that
5 they abruptly suspended his license without no -- no notice.

6 So it's not surprising he would -- he would need a
7 month to figure out his insurance so he could afford an
8 attorney, and then, you know, find someone who could help him.
9 A month is not a significantly long time considering the board
10 didn't do their duties in providing a hearing right away and
11 also suspended his license abruptly.

12 I also want to go to the government interest,
13 Your Honor.

14 The government interest is, you know, whether they
15 couldn't provide a pre-deprivation hearing prior to suspending
16 his license. They seemed to skirt around the issue of whether
17 it would have cost them, you know, administrative or financial
18 burdens, and I think that's very notable because it wouldn't
19 have cost them anything. They would have conducted this hearing
20 regardless, so they could have provided him a hearing before
21 suspending his license.

22 I also want to talk about the irreparable injury.

23 Your Honor, it's irreparable harm when you violate
24 someone's constitutional rights. That constitutes irreparable
25 harm.

1 And he's not just suffering harm, Your Honor. They
2 have tarnished his reputation. It is now well-known,
3 Your Honor, in the media what has happened. This is going to
4 hurt his earning capacity for years on end and his reputation as
5 a credible doctor.

6 And Your Honor, I think it's also important to note
7 that they suspended his license over the phone. They couldn't
8 even give him -- they couldn't even serve him a suspension
9 order. He had to learn about it in the media.

10 And regarding the cases, Your Honor, regarding their
11 burden of showing an emergency, they seem to want to flip the
12 burden. It's their burden to show that he constitutes an
13 emergency and why they should be able to circumvent the normal
14 due process required under Oregon law which is providing a
15 predetermination hearing.

16 They claim that he hasn't proven that no COVID-19 case
17 has been traced to his office. He actually has alleged that in
18 the complaint. And it's their burden to show that he
19 constitutes an imminent threat and they have, again, failed to
20 do that.

21 You know, we can argue the science, Your Honor. There
22 are lots of studies. There are a lot of reputable doctors that
23 would disagree with the science they're providing. And I'm not
24 sure why they think that their science is better than our -- the
25 other science that is out there that shows that masks do not

1 have a material effect in curtailing the spread of COVID-19.

2 There are studies that we cite to in our declaration.

3 And I also -- finally, Your Honor, I want to talk
4 about the patients.

5 The board seems to know what is best for the patients,
6 but they don't know what is best for the patients. They rely on
7 Dr. LaTulippe because they trust Dr. LaTulippe. He provides a
8 unique pain treatment that other doctors do not provide. In
9 fact, that is why they go to Dr. LaTulippe, because many of them
10 were just addicted to painkillers and, quite frankly, just
11 didn't have a good quality of life. So that is -- that is why
12 they -- they rely on Dr. LaTulippe.

13 So in sum, Your Honor, I do not believe that the board
14 has any justification in not providing my client a
15 predetermination hearing, and I think it's very clear that my
16 client is suffering irreparable harm, not only financial harm,
17 but reputational harm, and the harm to his constitutional
18 rights.

19 Thank you.

20 THE COURT: Thank you.

21 It is the Court's observation that when you boil it
22 down there really is not a great deal of dispute regarding the
23 facts in this case.

24 The State of Oregon, through the medical board,
25 learned that the plaintiff was not following the required COVID

1 protocols in his medical practice. The state notified the
2 plaintiff regarding this issue and received correspondence back
3 from the plaintiff regarding his perspective on the COVID
4 protocols.

5 Two letters were sent to the plaintiff; one in August,
6 and one in November of 2020. Each letter warned the plaintiff
7 of the possible sanctions for failing to comply with the
8 protocols. The first letter notified the plaintiff that he was
9 under investigation and asked him to respond to the allegations
10 regarding the failure to follow certain COVID protocols.

11 In addition, there was allegations that along with him
12 not following protocols or failing to follow proper protocols,
13 he was advising others, including his own patients, that masks
14 should not be worn and that -- and he was accused of making
15 posts on social media discouraging people from following
16 distancing guidelines related to COVID.

17 In the first letter, the plaintiff was told that the
18 investigation was made pursuant to ORS 677.320 and he was
19 expected to respond by September the 3rd. That was the August
20 letter.

21 In his response, the plaintiff disputed the social
22 distancing allegations and that he had done anything on social
23 media. As regards the masks, he explained that the mask
24 requirements were based on bogus science and explained that he
25 was taking the position he was regarding masks for science

1 reasons.

2 While the first letter described possible outcomes of
3 the investigation and included suspension as a possibility, the
4 second letter merely said that his care of patients was not
5 consistent with the standards, might be unprofessional and
6 dishonorable and dangerous to the health or safety and subject
7 to administrative sanctions. He was told he needed to comply
8 with the law regarding PPE and with the standards of medical
9 care expected by medical professionals.

10 To that second letter, the plaintiff responded by
11 saying he was doing a good job, there were no infections at his
12 clinic, but did not say that he would comply with the PPE
13 requirements.

14 Then, in December, the OMB investigator went to the
15 clinic, and based on the investigation, the OMB found that masks
16 were only required at the clinic if someone had COVID or other
17 symptoms but that patients and providers were not wearing masks.

18 After learning that and gathering the information that
19 it had, the OMB issued an emergency suspension order based both
20 on ORS 677.25 -- 205(3) and 183.430(2). They did that because
21 they felt that plaintiff's practice was an immediate danger to
22 the public and presented a serious danger to the public's health
23 or safety.

24 The notice that was given to the plaintiff in that
25 suspension order said that he had a right to a hearing as soon

1 as practicable, and after a month, the plaintiff asked for a
2 hearing which is now scheduled for February the 16th. It's also
3 true that there was an earlier hearing date available, but the
4 plaintiff needed a little bit more time.

5 Thereafter, the plaintiff sued in this court alleging
6 violation of the First and Fourteenth Amendment and seeking a
7 temporary restraining order based on procedural due process.

8 Regarding a restraining order, the Court is to
9 evaluate the four *Winter* factors: First, the likelihood of
10 success on the merits; second, the issue of irreparable harm;
11 third, the Court is to consider the equities as between the
12 parties; and, finally, the Court is to consider the interests of
13 the public.

14 As regards the likelihood of success on the merits, I
15 consider the issue under *Gilbert*, and there's the three factors
16 that the parties have asked me to take a look at: The private
17 interest and how that will be affected; secondly, the risk of an
18 erroneous deprivation of such an interest through the procedures
19 used, and the probable value, if any, for additional substantive
20 procedural safeguards; and, third, the government's interests
21 including the function involved in the fiscal and administrative
22 burdens additional or substitute procedural requirements would
23 entail.

24 In looking at the private interests, it is the
25 defendant's ability to earn a living which has been temporarily

1 suspended and will ultimately be decided at a hearing which is
2 scheduled in a couple of weeks.

3 The other factor, the risk of erroneous deprivation, I
4 think the Court needs to take a look at what would have been
5 different had the matter immediately proceeded to some type of
6 hearing and whether there was a risk of an erroneous deprivation
7 of such interests. The Court finds there is not.

8 In this case, once again, there are little or few
9 disputes about the facts. It is clear that the doctor, for his
10 own reasons, reasons that he believes are scientifically based,
11 is not complying with PPE protocols. That was true before
12 his -- when he first learned that he was under investigation and
13 continued to be true up through the time that he was suspended.
14 Having had a hearing earlier on would not have changed that
15 reality.

16 And it is not this Court's job to judge the science.
17 This is a summary proceeding. I'm not judging who's right or
18 who's wrong about the science. It is clear that the state has
19 promulgated rules which physicians and everybody else is
20 expected to comply with.

21 So that factor, the risk of erroneous deprivation, I
22 find tips in the favor of the state.

23 And then finally, the government's interest.

24 The government has a very large interest in making
25 sure people are safe. These existing protocols support that

1 view.

2 Under ORS 677.205(3), it states that, "If the board
3 finds that evidence in its possession indicates that a
4 continuation in the practice of a license constitutes an
5 immediate danger to the public..." It does not say that the
6 state must show that someone has in fact been harmed. It simply
7 states that the board finds that the evidence in its possession
8 indicates the continuation and practice of a license constitutes
9 immediate danger. The board in this case made that finding.

10 In addition, part of the Court's consideration is the
11 time between the deprivation, that is when the license was
12 suspended, until a hearing, and in this case the Court finds
13 that that period of time is not unreasonable. The plaintiff is
14 entitled to a post-deprivation hearing and has one scheduled in
15 the next couple of weeks.

16 Other factors that are important to the Court to
17 consider are the risk of not acting. There is some risk that
18 the state might be incorrect about all of this. But again,
19 there is a hearing scheduled which will address that issue. On
20 the other hand, if the state is correct, then lives may well be
21 saved by the steps that the state has taken.

22 In turning to the *Winter* factors, is there a
23 likelihood of success on the merits on the part of plaintiff? I
24 find there is not a likelihood of success on the merits for the
25 reasons that I have described. The state followed the ORSs

1 under 677.205, found that there was an emergency, and has
2 provided for a hearing within a short period of time; therefore,
3 I do not find that on the Fourteenth Amendment claim the
4 plaintiff is likely to succeed on the merits.

5 As regards irreparable harm, the irreparable harm
6 prong only goes to the irreparability of harm as regards the
7 plaintiff. And in this case, his ability to earn a living is
8 temporarily suspended under the statute until a hearing can take
9 place and a decision on the merits can be made. I do not find
10 that that harm is irreparable, particularly in light of the fact
11 that he gets a lot of process and hearing which will occur
12 within the next couple of weeks.

13 As regards the balance of equities, the plaintiff's
14 need for a license in order to make a living as against the risk
15 of harm that can occur as a result of a pandemic and the spread
16 of a deadly disease, I find that the balance of equities tips in
17 favor of the state.

18 And as regards the public interest, in this case, I do
19 give some consideration to the patients of Dr. LaTulippe because
20 they are, in fact, members of the public. But as regards the
21 interests of that population and the general public and the risk
22 of a pandemic spreading through the general public as a result
23 of Dr. LaTulippe's decisionmaking process, I find, again, that
24 factor tips in favor of the state.

25 For those reasons, the motion for a temporary

1 restraining order is denied. This case will now proceed to the
2 next phase which will be a hearing on a preliminary injunction.

3 I believe I have told you that I have an interest in
4 making this decision today because I was aware that a hearing
5 was coming up quickly.

6 At this juncture, I want the parties to confer about
7 proposed dates for the next phase. That will allow for
8 discovery to take place between now and the next date for a
9 preliminary injunction. And after the parties have conferred,
10 please contact the court. We'll set a scheduling conference and
11 we will move on from there.

12 Is there anything else from the plaintiff's
13 perspective at this juncture?

14 MS. GONDEIRO: Your Honor, there is two important
15 things.

16 One is, regarding the hearing, even though it's on the
17 16th, it doesn't end until the 21st, and then the earliest time
18 that they can actually issue a decision is April 1st because the
19 administrative law judge has to confer with the board. So even
20 though the hearing is coming up, he won't get a decision for a
21 few more months.

22 And as I -- I guess I just -- there are two main
23 things I disagree with. There are many disputed facts. The
24 order, the client does actually dispute the allegations and the
25 findings of fact. Those are not actually undisputed. He --

1 THE COURT: That's not really what my question was
2 focused on. My question was: Is there anything else that you
3 need me to address at this moment?

4 MS. GONDEIRO: No, just the hearing, letting you know
5 that hearing timeline.

6 THE COURT: All right. Thank you.

7 Is there anything else from the defense that you need
8 me to address at this juncture?

9 MR. ABRAMS: Your Honor, we are going to have a
10 conference call with plaintiff's counsel shortly after this
11 hearing ends to deal with the scheduling, just to let you know
12 that.

13 Our only question is, is there anything that is of
14 particular interest to you that you would like us to focus on in
15 preparing for the preliminary injunction to assist the Court in
16 its function?

17 THE COURT: There's nothing that I can think of at
18 this particular juncture. Everything that occurred during the
19 preparation for the temporary restraining order, from my
20 perspective, was comprehensive. It may be that in discovery the
21 parties will learn other things that may be relevant to the
22 Court's decision at a preliminary injunction hearing. That I
23 cannot predict.

24 MR. ABRAMS: Thank you, Your Honor.

25 Nothing further from us.

1 THE COURT: Thank you. That's all for today.

2 Thank you.

3

4 (The proceedings concluded at 2:33 p.m.)

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C E R T I F I C A T E

I certify, by signing below, that the foregoing is a true and correct transcript, to the best of my ability, of the videoconference/telephonic hearing taken by stenographic means. Due to the videoconference/telephonic connection, parties appearing via videoconference, speakerphone or cell phone, speakers overlapping when speaking, speakers not identifying themselves before they speak, fast speakers, the speaker's failure to enunciate, and/or other technical difficulties that occur during videoconference/telephonic proceedings, this certification is limited by the above-mentioned reasons and any technological difficulties of such proceedings occurring over the videoconference/speakerphone at the United States District Court of Oregon in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

DATED this 21st day of February, 2021.

// Ryan White

RYAN WHITE
Registered Merit Reporter
Certified Realtime Reporter
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Oregon CSR No. 10-0419
Expires 12/31/2023

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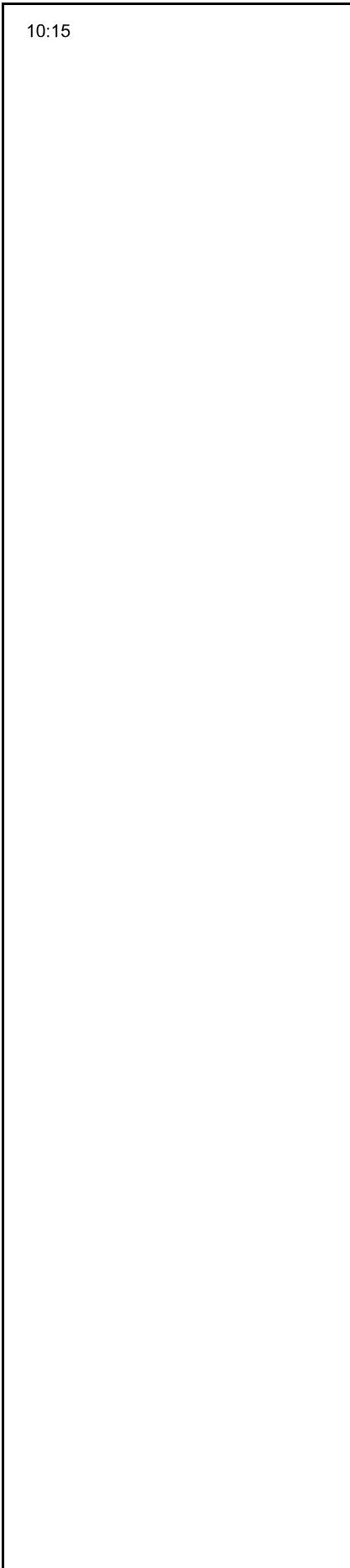
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CERTIFICATE OF SERVICE

I certify that on March 18, 2021, I served the foregoing DECLARATON OF MARC ABRAMS IN SUPPORT OF PARTIAL MOTION TO DISMISS upon the parties hereto by the method indicated below, and addressed to the following:

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